

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

HUGH L. STEWART,

Plaintiff, No. CIV S-03-0469 FCD KJM P

vs.

BAXTER DUNN, et al.,

Defendants. FINDINGS AND RECOMMENDATIONS

Plaintiff is a California civil detainee<sup>1</sup> proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. Defendants Dunn, San Joaquin County, Divinia, and Franks have filed a motion to dismiss or for summary judgment. Plaintiff has filed an opposition; defendants have not replied.

I. Statute of Limitations

Defendants argue that some of plaintiff's claims are time-barred. Mot. to Dismiss or for Summ. J. (Mot.) at 11:12-12:5. Because § 1983 does not contain a statute of limitations, federal courts apply the forum state's statute of limitations for personal injury actions. Johnson

<sup>1</sup> While it is not entirely clear, it appears plaintiff is being held under California's Sexually Violent Predator Act (SVPA), Cal. Welf. & Inst. Code § 6600 *et seq.*, and is being housed in the San Joaquin County Jail for the duration of court proceedings related to plaintiff's commitment. See Am. Compl. at 3; Mot. at 5:23-24.

v. California, 207 F.3d 650, 653 (9th Cir. 2000). When not inconsistent with federal law, federal courts also apply the law of the forum state regarding tolling. Id. Federal law controls the question of when a claim accrues. Id. Under federal law, a claim accrues when plaintiff knew, or should have known, of the injury that is the basis of his cause of action. Id.

In his amended complaint, plaintiff asserts, in part, as follows:

On 7/29/00 I arrived at San Joaquin County Jail in a wheel chair and a cast on my right calf, caused by an accident, which caused a torn tendon. I was ordered by Officer Franks . . . to get out of the chair and walk. I explained that I can not walk and that my doctor ordered me not to get out of the chair. Officer Franks left, but returned and stated that his Boss BAXTER DUNN ordered him (Franks) to order me to get up and walk, even if he has to use force. I was surrounded by police officers who just stood there while I hobbled, fell, then crawled to a holding cell, and was held in that cell for approximately 14 hours before I was sent to the Medical part of the jail in a wheel chair . . .

Am. Compl. at 4 (capitalization in original).

In California, the limitations period applicable to this claim is one year. Johnson, 207 F.3d at 653; Cal. Civ. Proc. Code § 340(3).<sup>2</sup> Accordingly, absent any tolling of the limitations period, this claim is time-barred as this action was not filed until March 10, 2003.

California statutory law does not provide for any tolling of the limitations period with respect to plaintiff's claim.<sup>3</sup> However, the Ninth Circuit recently has held that under California law equitable tolling of the limitations period is warranted where a civil detainee, who has been confined from the time his claims accrue until the time he files his federal lawsuit, pursues his otherwise time-barred claims in good faith. Jones, 393 F.3d at 927-30. From the

<sup>2</sup> On January 1, 2003, the California legislature increased the limitations period for these types of claims to two years. Cal. Civ. Proc. Code § 335.1. However, the one year limitations period found in California Code of Civil Procedure § 340(3) is applicable to this claim because that limitations period would have run out before the new limitations period was enacted. Wade v. Ratella, 407 F. Supp. 2d 1196, 1203 (S.D. Cal. 2005).

<sup>3</sup> The court notes that California Code of Civil Procedure § 352.1(a) provides tolling for prisoners. But this provision does not apply to cases brought by those such as plaintiff who are civil detainees. Jones v. Blanas, 393 F.3d 918, 927-28 (9th Cir. 2004), cert. denied sub nom. County of Sacramento v. Jones, \_\_\_\_ U.S. \_\_\_, 126 S. Ct. 351 (2005).

1 record before the court, it appears that plaintiff has pursued the above claim, and any other claim  
2 in plaintiff's amended complaint that might otherwise be barred by the applicable limitations  
3 period,<sup>4</sup> in good faith; defendants point to nothing suggesting plaintiff is acting in bad faith.  
4 Therefore, the court should reject defendants' statute of limitations defense.

5 **II. Failure To Exhaust Administrative Remedies**

6 Defendants argue that under Booth v. Churner, 532 U.S. 731 (2001), and the  
7 Prison Litigation Reform Act (PLRA), see 42 U.S.C. § 1997e(a), plaintiff must exhaust all  
8 administrative remedies available to him prior to filing suit and, with respect to the claims  
9 brought in this action, plaintiff failed to do so. Mot. at 12:6-27. However, neither Booth nor 42  
10 U.S.C. § 1997e(a) is applicable to plaintiff's claims because plaintiff is not a prisoner, but a civil  
11 detainee. Page v. Torrey, 201 F.3d 1136 (9th Cir. 2000). Defendants' failure to exhaust  
12 argument must be rejected.

13 **III. No Physical Injury**

14 Defendants' third argument is that some of plaintiff's claims are barred by 42  
15 U.S.C. § 1997e(e), which provides:

16 No Federal civil action may be brought by a prisoner confined in a  
17 jail, prison, or other correctional facility, for mental or emotional  
18 injury suffered while in custody without a prior showing of  
physical injury.

19 See Mot. at 13:1-12. Again, plaintiff is not a prisoner. This provision of the PLRA does not  
20 apply to plaintiff. Page, 201 F.3d at 1139.

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26<sup>4</sup> The court understands all of plaintiff's claims to have accrued during his present term  
of confinement.

1     IV. Qualified Immunity

2                 Defendants argue that they are entitled to immunity from plaintiff's Eighth  
3 Amendment claim based upon the doctrine of qualified immunity,<sup>5</sup> and also that plaintiff has  
4 failed to state a valid claim for relief under the Eighth Amendment. Mot. at 13:13-15:4.  
5                 However, in this court's May 3, 2005 order issued in part under 28 U.S.C. 1915(e)(2), the court  
6 informed the parties that this action is proceeding only on claims arising under the Fourteenth  
7 Amendment. This is because plaintiff is not a prisoner and "the Eighth Amendment is not the  
8 proper vehicle to challenge the conditions of civil commitment." Hydrick v. Hunter, 449 F.3d  
9 978, 997-98 (9th Cir. 2006).

10     V. Respondeat Superior

11                 Defendants argue that Dunn and San Joaquin County should be dismissed because  
12 there is no respondeat superior liability in section 1983 actions.<sup>6</sup>

13                 A municipality cannot be held liable under 42 U.S.C. § 1983 based upon a theory  
14 of respondeat superior. Monell v. Dep't of Social Services, 436 U.S. 658, 691 (1978). Rather, a  
15 municipality can be held liable under § 1983 only if some official policy adopted by the  
16 municipality resulted in a violation of constitutional rights. Id.

17                 In his amended complaint, plaintiff fails to make any specific allegations with  
18 respect to San Joaquin County; he simply names that entity as a defendant. Also, in plaintiff's  
19 opposition to defendants' motion, plaintiff fails to make any argument with respect to San  
20 Joaquin County. In resolving this aspect of defendants' motion, the court proceeds under Federal  
21 Rule of Civil Procedure 56. See Fed. R. Civ. P. 12(b).

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23                 <sup>5</sup> Government officials performing discretionary functions generally are shielded from  
24 liability for civil damages insofar as their conduct does not violate clearly established statutory or  
constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457  
U.S. 800, 818 (1982).

25                 <sup>6</sup> Oddly, defendants also ask that the San Joaquin County Jail be dismissed from this  
26 action while acknowledging that the jail is not named as a defendant in plaintiff's amended  
complaint. Mot. at 17:7-18.

1           Summary judgment is appropriate when it is demonstrated that there exists “no  
2 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
3 matter of law.” Fed. R. Civ. P. 56(c).

4           Under summary judgment practice, the moving party

5           always bears the initial responsibility of informing the district court  
6           of the basis for its motion, and identifying those portions of “the  
7           pleadings, depositions, answers to interrogatories, and admissions  
on file, together with the affidavits, if any,” which it believes  
demonstrate the absence of a genuine issue of material fact.

8           Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). “[W]here the  
9 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary  
10 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers  
11 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,  
12 after adequate time for discovery and upon motion, against a party who fails to make a showing  
13 sufficient to establish the existence of an element essential to that party’s case, and on which that  
14 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof  
15 concerning an essential element of the nonmoving party’s case necessarily renders all other facts  
16 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as  
17 whatever is before the district court demonstrates that the standard for entry of summary  
18 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

19           If the moving party meets its initial responsibility, the burden then shifts to the  
20 opposing party to establish that a genuine issue as to any material fact actually does exist. See  
21 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to  
22 establish the existence of this factual dispute, the opposing party may not rely upon the  
23 allegations or denials of its pleadings but is required to tender evidence of specific facts in the  
24 form of affidavits, and/or admissible discovery material, in support of its contention that the  
25 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party  
26 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome

1 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
2 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.  
3 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
4 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
5 1436 (9th Cir. 1987).

6 In the endeavor to establish the existence of a factual dispute, the opposing party  
7 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
8 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
9 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary  
10 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a  
11 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
12 committee’s note on 1963 amendments).

13 In resolving a summary judgment motion, the court examines the pleadings,  
14 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
15 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
16 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
17 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.  
18 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to  
19 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen  
20 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir.  
21 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply  
22 show that there is some metaphysical doubt as to the material facts . . . . Where the record taken  
23 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
24 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

25 On September 23, 2005, the court advised plaintiff of the requirements for  
26 opposing a motion under Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland,

1 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999); Klingele v.  
2 Eikenberry, 849 F.2d 409 (9th Cir. 1988).

3 Plaintiff has had the opportunity to respond to defendants' motion, styled in the  
4 alternative as a motion for summary judgment. Plaintiff's response consists of a nine page,  
5 unverified memorandum and a verified response to a declaration submitted by defendants. The  
6 response to the declaration contains no evidence with respect to any offending San Joaquin  
7 County policy.

8 Because plaintiff fails to present anything suggesting that there is a genuine issue  
9 of material fact with respect to whether San Joaquin County instituted a policy that resulted in  
10 plaintiff's constitutional rights being violated, the court will recommend that defendants be  
11 granted summary judgment with respect to plaintiff's claims against San Joaquin County.

12 With respect to plaintiff's claims against defendant Dunn, the former Sheriff of  
13 San Joaquin County, there can be no liability under 42 U.S.C. § 1983 unless there is some  
14 affirmative link or connection between his actions and the claimed deprivation of plaintiff's  
15 constitutional rights. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167  
16 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory  
17 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
18 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

19 The complaint, which is verified, states that Dunn personally ordered that plaintiff  
20 be made to get out of his wheelchair and walk; this is sufficient to state a claim for relief against  
21 defendant Dunn for a violation of plaintiff's rights arising under the Fourteenth Amendment as  
22 the allegations, if true, would amount to an objectively unreasonable use of force. Hydrick, 449  
23 F.3d at 1000.

24 Elsewhere in the complaint, plaintiff alleges generally that defendant Dunn  
25 subjected plaintiff to conditions of confinement in the San Joaquin County Jail that are  
26 unconstitutional considering plaintiff is a civil detainee and not a convicted criminal. Am.

1 Compl. at 3-4. Plaintiff fails to assert, however, that any of the conditions he endured while  
2 housed at the San Joaquin County Jail, except for Dunn's order that plaintiff rise from his  
3 wheelchair, were attributable to Dunn. In his opposition to defendants' motion, plaintiff also  
4 fails to specify any conditions of his confinement, except for the wheelchair incident, that were  
5 attributable to defendant Dunn. For these reasons, this court will recommend that defendants be  
6 granted summary judgment with respect to all of plaintiff's claims against defendant Dunn  
7 except for the claim related to the wheelchair incident occurring on July 29, 2000.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

9                   1. Defendants' December 20, 2005 motion to dismiss or for summary judgment  
10 be granted in part and denied in part as follows:

A. Granted as to plaintiff's claims against San Joaquin County, thereby dismissing San Joaquin County from this action;

B. Granted as to plaintiff's claims against defendant Dunn except for plaintiff's claim that Dunn violated plaintiff's Fourteenth Amendment rights by ordering that plaintiff be made to get up from his wheelchair on July 29, 2000; and

C. Denied in all other respects.

2. Defendants Dunn, Franks and Divinia be ordered to file their answer within

twenty days of any order adopting the foregoing findings and recommendations.

These findings and recommendations are submitted to the United States District

Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned

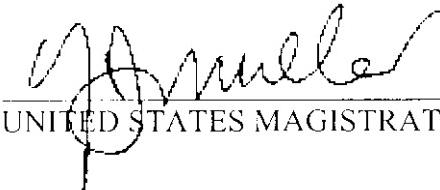
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1 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
2 shall be served and filed within ten days after service of the objections. The parties are advised  
3 that failure to file objections within the specified time may waive the right to appeal the District  
4 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: August 7, 2006.

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UNITED STATES MAGISTRATE JUDGE  
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